U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 February 2004

CASE NO.: 2002-LHC-2121

OWCP NO.: 07-157913

IN THE MATTER OF:

JEFFERSON BROOKS

Claimant

v.

SHAW RESOURCE SERVICES, INC.

Self-Insured Employer[1]

APPEARANCES:

DAVID A. DALIA, ESQ.

For The Claimant

MARK D. LATHAM, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Jefferson Brooks (Claimant) against The Shaw Group, Inc. (Employer).

[1] Liberty Mutual Insurance Company (Liberty) is the third-party claims administrator for Employer, which is self-insured. (Tr. 16, 113-117).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on July 17, 2003, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 17 exhibits. Employer proffered 15 exhibits which were admitted into evidence along with one Joint Exhibit. Claimant's exhibit 17 was reserved for the deposition of Dr. Louis C. Blanda, Jr., while Employer's exhibits 16 and 17 were reserved for depositions of Dr. Michel E. Heard and physical therapist Claude Tremblay, respectively.[2]

The record was left open to complete the post—hearing depositions of Dr. Blanda, Dr. Heard and Mr. Tremblay. On November 17, 2003, after the parties were allowed extensions of post-hearing deadlines to develop the record, Employer submitted the deposition transcripts of Dr. Heard and Mr. Tremblay as EX-16 and EX-17, respectively. On November 24, 2003, Claimant submitted the deposition transcripts of Dr. Blanda and Mr. Tremblay as CX-17 and CX-18, respectively.[3] On November 25, 2003, the submissions were received, and the record was closed. This decision is based upon a full consideration of the entire record.

Post-hearing briefs were received from Claimant and Employer on January 23, 2004. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find that:

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[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer's Exhibits: EX-___; and Joint Exhibit: JX-1.

[3] For the purposes of explication, Mr. Tremblay's deposition which was received as CX-18 and EX-17 and was originally reserved for identification and received as EX-17, will be referred to as EX-17.

1. Claimant was allegedly injured on August 24, 2000. (Tr. 19-20).

2. Claimant's alleged injury occurred during the course and scope of his employment with Employer. (Tr. 19-20).

3. There existed an employee-employer relationship at the time of the alleged accident/injury. (Tr. 19-20).

4. Employer was notified of the alleged accident/injury on August 24, 2000. (Tr. 19-20).

5. Employer filed its LS-202 on August 25, 2000.

6. Claimant received medical care from Dr. James Trahan, who was recommended by Employer.

7. Dr. Trahan's services on and after August 25, 2000, were paid for by Employer.

8. Dr. Trahan recommended Claimant return to work in a modified duty position.

9. Claimant did not return to work in a modified duty position.

10. Claimant continued treating with Dr. Trahan through September 12, 2000, when Dr. Trahan referred Claimant to Dr. Douglas Bernard.

11. Claimant was examined by Dr. Bernard on September 20, 2000.

12. Employer filed a Notice of Controversion on September 26, 2000, after receiving Dr. Bernard's report.

13. Dr. Blanda is Claimant's choice of treating physician who initially treated Claimant on February 6, 2001.

14. Claimant filed his LS-203 on February 22, 2001.

15. An informal conference before the District Director was held on November 8, 2001, when the parties agreed that Claimant would undergo an independent medical examination with Dr. Murphy at Employer's expense pursuant to Sections 7(e) and (f) of the Act, as recommended by the Department of Labor (DOL).

16. DOL forwarded Dr. Murphy's report to the parties on December 20, 2001.

17. Medical benefits for Claimant have been paid in the amount of $5,686.96 pursuant to Section 7 of the Act.

18. Employer refused to authorize surgery.

19. Employer paid no compensation benefits.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

2. Whether a January 2001 motor vehicle accident was an intervening cause truncating Employer's liability under the Act.

3. The nature and extent of Claimant's disability.

4. Whether Claimant has reached maximum medical improvement.

5. The reasonableness and necessity of recommended surgery.

6. Claimant's average weekly wage.

7. Entitlement to and authorization for medical care and services.

8. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was born on October 30, 1953, and was 49 years of age at the formal hearing. He is married with children and has a ninth-grade education. Prior to working for Employer, Claimant performed blasting, painting and welding jobs. He has some experience with carpentry. (Tr. 38-41).

Claimant testified he worked as a sandblaster/painter for Employer. He initially worked in Employer's yard before accepting "hitches," which refer to two-week offshore assignments. On August 24, 2000, during his fourth hitch, he was injured while lifting a grating with two co-workers. The grating weight shifted to him, and he felt a burning sensation in his lower back. After the grate was tied off, he reached for a blasting hose when his back "locked up" and he could not move. He reported the injury to his supervisor, who arranged for Claimant's transportation to shore. (Tr. 41-49).

Claimant stated he was returned to a half-way house where he resided. On August 25, 2000, he treated with Dr. Trahan for symptoms of increased pain which precluded him from physical activity. Dr. Trahan examined Claimant, but ordered no X-rays. He prescribed Aleve, Tylenol and hot water soaks, but prescribed no pain medications. Claimant recalled receiving a disability slip from Dr. Trahan, who disabled Claimant from returning to work for a few days; however, Claimant indicated Dr. Trahan told Employer that Claimant could nevertheless return to work. (Tr. 48-52).

Claimant recalled undergoing further medical evaluations with another physician at Dr. Trahan's office. He was unable to comply with physical examinations at the time due to ongoing, constant pain. His pain disturbed his sleep and caused emotional irritability. The physician prescribed no pain medications. Meanwhile, Claimant experienced financial difficulties because he received no compensation benefits. (Tr. 54-58).

Claimant testified he was referred by Dr. Trahan to Dr. Bernard, who provided massage and electric therapy treatments which temporarily provided some pain relief. Dr. Bernard prescribed no pain medications. After Claimant's pain persisted, Dr. Bernard ordered an MRI. (Tr. 52-53, 58-59).

Claimant indicated Employer approved his request for Dr. Louis Blanda as his choice of physician, but continued arranging appointments with Dr. Bernard instead. Claimant could not immediately treat with Dr. Blanda because of transportation difficulties. Dr. Blanda's office is in Lafayette, Louisiana, which is approximately 20 miles away from Claimant's home in New Iberia, Louisiana. Employer provided no transportation, which delayed Claimant's treatment with Dr. Blanda. Claimant eventually treated with Dr. Blanda, who prescribed Soma and Lortab. Employer refused to pay for the medications. Dr.

Blanda recommended sugery, which Claimant is willing to undergo, but Employer refused to authorize the procedure. Claimant also received emergency room treatment for ongoing back pain on three to five occasions. (Tr. 59-64).

Claimant recalled undergoing a medical evaluation by Dr. Murphy at the request of DOL, which advised Claimant to bring copies of his MRIs to the examination. The examination did not go well because Claimant was unable to perform physical motions due to pain. (Tr. 64-66).

Claimant stated he cannot presently work nor perform his former job because of pain which is "always hurting."[4] He is still under the care of Dr. Blanda, who has not released him to return to work. His pain persists and continues to disturb his sleep. His daily activities consist of staying in bed, watching TV and reading. He has had post-injury financial problems which resulted in approximately four evictions and numerous terminations in utility services. (Tr. 64-67).

Claimant indicated he received no reimbursements for medication expenses he incurred. He was on Welfare at one point and was covered under Medicare; however, he lost benefits under Medicare when he was unable to return to work per the recommendation of a Medicare representative. (Tr. 69-70).

Claimant recalled a motor vehicle accident in January 2001. The accident resulted in a severe knee injury. He did not report a back injury when he underwent medical treatment for his knee because his back was already painful from his job injury. No lawsuits were filed as a result of the accident. (Tr. 67-69).

On cross-examination, Claimant admitted he married his current wife after his job injury. He was confronted with his discovery responses which refuted his testimony about employment in the 1990s. His prior responses did not identify painting or blasting work. Rather, his responses indicated he earned $5.75 per hour as a maintenance worker for Black Manilla Apartments from 1991 through 1994. Thereafter, his responses indicated he was incarcerated from 1996 through 1999 related to a drug conviction. Claimant admitted Employer provided yard jobs which would not require offshore duties. (Tr. 71-76).

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[4] I note that based on my observation Claimant did not exhibit any problems with postural positions or pain while testifying at the formal hearing. (Tr. 38-104).

Claimant affirmed that Dr. Trahan recommended returning to light work which would improve his condition. He admitted that Employer offered him light work; however, he did not return because of low back pain. Claimant could not recall whether he requested authorization for Dr. Blanda's treatment from Employer, Dr. Trahan or Mr. Broussard.[5] He did not make an appointment to treat with Dr. Blanda while he treated with Drs. Trahan and Bernard. (Tr. 77-78).

Claimant discussed the events of his January 1, 2001 car accident. His car was "totaled," and he was arrested for driving while intoxicated; however, he was not convicted of the offense, which was dismissed. He admitted he was immobilized on a spine board by the ambulance service which transported him to a hospital. (Tr. 78-84; EX-10, pp. 11-13).

Claimant indicated he went to physical therapy pursuant to Dr. Trahan's recommendation on only one occasion, but records in evidence do not support his time frame for undergoing therapy. Claimant acknowledged the records indicate he received treatment from February 13, 2001 through April 4, 2001, after he began treating with Dr. Blanda. (Tr. 86-88; EX-12).

Claimant stated he could not locate Dr. Trahan's disability slip precluding his return to work. He was confused by Dr. Trahan's statement to Employer that he could return to work. (Tr. 89-90).

On re-direct examination, Claimant indicated his earlier recollections about welding, painting and sandblasting referred to employment in the 1970s and 1980s rather than during the 1990s. He admitted requesting Dr. Blanda's treatment with Drs. Trahan and Bernard. He assumed the physicians would authorize his requests. He recalled providing Dr. Trahan's disability slip to Employer's representative who was a "head safety man." He kept copies of the paperwork, but could not locate the disability slip. (Tr. 95-101).

On re-cross-examination, Claimant acknowledged authorizations for medical evaluation and treatment which

[5] Harold Broussard, whose credentials are not of record, is Dr. Trahan's assistant. According to Dr. Trahan, Mr. Broussard is a licensed assistant who obtained a background in orthopedic problems and minor surgery after completing three years of training and subsequent orthopedic work. (EX-5, pp. 8-10).

indicated he could return to work on August 24 and 25, 2000, were typical of the paperwork he provided to Employer's representative, which may have been Rick Keen. (Tr. 101-104).

Shirley Brooks

Mrs. Brooks testified that she married Claimant after his work accident. She corroborated Claimant's testimony about experiencing ongoing pain, which precludes him from working and which causes him emotional irritability and sleep interruptions. She confirmed Claimant's testimony that his main activities include laying in bed, watching television and reading books and that their family has been evicted approximately four times. (Tr. 105-111).

John Mollere

Mr. Mollere testified he works as a loss prevention manager for Employer. He stated that Liberty Mutual Insurance Company was Employer's third-party administrator which handled medical expenses. According to Mr. Mollere, Mr. Keen maintained a record log detailing Claimant's treatment. Mr. Mollere acknowledged a September 12, 2000 copy of Claimant's log, which he received from Mr. Keen. (Tr. 113-117; EX-14).

Mr. Mollere testified Employer offered Claimant light duty work at his prior rate of pay when Dr. Trahan opined Claimant could perform such work; however, Claimant never reported to work for light duty.[6] After Dr. Bernard found evidence of exaggeration and malingering, Employer filed a Notice of Controversion and refused to pay ongoing compensation benefits. (Tr. 117-119).

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[6] Mr. Mollere did not indicate when Employer offered the light-duty position to Claimant; however, Mr. Keen's case management summary describes a light-duty job offer to Claimant on September 6, 2000, when Claimant refused to work because he was not dressed and did not want to work. The case management summary does not provide a job description which details the particular physical requirements of the light-duty job. Claimant was again advised of a light duty job offer on January 24, 2001, when Employer authorized Claimant's medical treatment with Dr. Blanda. The medical authorization does not detail the particular physical requirements of the light-duty job. (Tr. 113-119; EX-14, p. 3; EX-15).

Mr. Mollere did not recall Claimant seeking medical treatment during the interim period between Claimant's last treatment with Dr. Bernard and his first treatment with Dr. Blanda. When they received Dr. Blanda's first medical report, Employer sought an evaluation by Dr. Heard because time had passed since Dr. Bernard's last treatment and because Claimant sustained an injury in a car wreck. (Tr. 119-120).

Mr. Mollere indicated Employer complied with a DOL recommendation for Dr. Murphy's independent medical evaluation. Dr. Murphy recommended against surgery. Based on the results Employer received from Claimant's treatment and in reliance upon Dr. Murphy's findings, Employer continued to refuse compensation benefits. Mr. Mollere testified Dr. Blanda was the only physician who opined Claimant should not return to work. (Tr. 120-121).

On cross-examination, Mr. Mollere indicated D.L. Mattox was Liberty's claims adjuster. He acknowledged a transcript of D.L. Mattox's March 21, 2001 telephone call to Claimant's attorney in which Mr. Mattox advised that Claimant's medical benefits would be suspended. Mr. Mollere was unaware of the telephone call at the time it was made. (Tr. 121-125; EX-6).

Mr. Mollere was presented with a list of Employer's medical payments on Claimant's behalf. He did not know why Liberty continued paying medical benefits if Mr. Mattox indicated the benefits would be suspended. The list of expenses did not identify whether payments after March 21, 2001 were related to services before or after March 21, 2001. He indicated Claimant's benefits would be reinstated upon undergoing Dr. Heard's medical evaluation, which occurred on April 18, 2001. Mr. Mollere was unaware if anybody contacted Claimant or his attorney to inform them medical benefits were reinstated after the completion of Dr. Heard's evaluation. He assumed medical benefits were paid in consideration of Claimant's compliance with the medical evaluation. He was unaware of any requests for medical treatment after March 21, 2001, which were denied. (Tr. 125-129, 142-143, 145; EX-13)

Mr. Mollere stated Employer was not controverting Claimant's accident, which he acknowledged was a mild injury with symptoms. Rather, Employer was disputing the extent of Claimant's injury and the reasonableness and necessity of recommended surgery. According to Mr. Mollere, Employer relied on the medical reports and findings to determine whether benefits should be paid. He indicated he was unaware there was

a dispute over compensation benefits until Claimant treated with Dr. Blanda. Prior to that time, Claimant was released to light duty, which Employer was willing to accommodate. Mr. Mollere indicated Employer never refused to authorize medication which was requested. (Tr. 134-139, 143-146).

The Medical Evidence

James Trahan, M.D.

On April 17, 2002, Dr. Trahan, an occupational medicine physician who is Board-qualified in internal medicine and physical medicine, was deposed by the parties. Dr. Trahan provides services through the New Iberia office of the Occupational Medicine Clinic, which performs pre-placement physicals, drug screens and workmens' compensation evaluations. Dr. Trahan is assisted by Mr. Broussard, who is a licensed physician's assistant with a background in surgery and orthopedic complaints. (EX-5, pp. 5-11, 95).

Dr. Trahan testified he treated Claimant on August 25, 2000, the day after Claimant reported sustaining an injury to his back while working with a metal grate and hoses. Claimant complained of pain which was "very, very low down where the ligaments . . . hold the sacrum to the pelvis bone." Dr. Trahan indicated the painful area contains ligaments rather than muscles.[7] (EX-5, pp. 11-12, 89).

Dr. Trahan opined Claimant's results on physical and neurological examination were basically normal. Deep tendon reflex tests, which involve percussive tapping with a hammer over knees, legs and feet to identify a disc injury, were normal. Based on those results, Dr. Trahan opined it was "highly unlikely" Claimant suffered from nerve root impingement. Straight-leg raising tests revealed some limited range of motion which was consistent with Claimant's age. "Cross-table" flexion tests revealed normal ranges of motion bilaterally. Dr. Trahan opined Claimant's results on physical and neurological testing indicated "no evidence of any disc problems or nerve compression." (EX-5, pp. 12-23).

[7] Neither Dr. Trahan nor Mr. Broussard reported any history of back pain radiating through Claimant's legs or any numbness or tingling in Claimant's feet or toes. (EX-5, pp. 16-18, 89-93, 96-98).

According to Dr. Trahan, Claimant's August 25, 2000 X-ray results revealed congenital scoliosis, which is a slight curvature of the back unrelated to his job injury. Dr. Trahan explained the naturally occurring scoliosis, which typically affects muscles, would not cause Claimant's symptoms because the scoliosis occurred in "the thoracic area mainly in the upper lumbar" region, whereas Claimant's pain occurred much lower, where ligaments hold the sacrum with pelvic bones. (EX-5, pp. 12-18).

Dr. Trahan diagnosed a lumbosacral strain with sacroiliac inflammation of the ligaments. He explained such a diagnosis may be expected to resolve within four weeks with conservative treatment. Because Claimant's neurological examination was normal, Dr. Trahan prescribed Aleve, hot baths, a heating pad for nightly use and walking exercises. (EX-5, pp. 12-14, 26-29).

Dr. Trahan contacted Mr. Keen to arrange a modified duty job at Employer's facility in which Claimant could safely return to work. He explained that he released Claimant to "regular" duty on August 25, 2000, despite a diagnosis of lumbosacral strain and sacroiliac inflammation of the ligaments, because he was familiar with Mr. Keen, who would identify a suitable modified job, namely a job in the tool room or a "paperwork" job in a shop, at Employer's onshore facility notwithstanding a "regular" duty release.[8] (EX-5, pp. 12-14, 29-32).

According to Dr. Trahan, restrictions to modified duty generally result in decreases in claimants' post-injury wages. Consequently, he tried to keep Claimant on "regular" duty, which Mr. Keen would nevertheless limit to onshore jobs within Claimant's physical restrictions. He noted Mr. Keen denied a request by Employer's supervisor for Claimant to return to offshore work, which Mr. Keen deemed beyond Claimant's restrictions and limitations. Dr. Trahan opined Claimant was capable of returning to modified work, which would have improved Claimant's condition. Further, he opined Claimant's ligament complaints would not improve without returning to work. (EX-5, pp. 12-14, 29-32, 37-38).

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[8] On October 3, 2000, Dr. Trahan prepared an Attending Physician's Report of Injury and Treatment in which he reported Claimant was advised he was released to return to work on August 25, 2000, with restrictions against repetitive twisting, bending, stooping, or lifting more than 20 pounds. (EX-5, p. 98).

On September 1, 2000, Claimant returned with ongoing complaints of pain in the sacroiliac area of his lower back. He reported that his supervisor requested his return to offshore work. Results upon physical and neurological examination remained normal. Dr. Trahan released Claimant to return to "regular duty with the intention of keeping him in a safe place," and he discussed the restrictions with Mr. Keen. He explained that Claimant's work restrictions were "identically the same" as they were on August 25, 2000; however, he added the requirement Claimant should be in a safe place for the benefit of Claimant's supervisor, who should no longer conclude Claimant could return to offshore work. (EX-5, pp. 32-37; EX-5, exh. "B").

On September 6, 2000, Claimant returned to treat with Mr. Broussard, while Dr. Trahan was working in Lafayette, Louisiana.[9] Dr. Trahan acknowledged Mr. Broussard's report in which Mr. Broussard opined Claimant was uncooperative due to inconsistent results. Mr. Broussard noted he was unable to lift Claimant's legs in the supine position beyond five degrees before producing excruciating back pain while he was able to raise Claimant's legs in the sitting position to sixty degrees before producing back pain. Mr. Broussard reported Claimant denied attempting to return to light duty. He also noted Claimant indicated he was not exercising at home, but was "sitting around most of the day." (EX-5, pp. 39, 47-50, 91-91a).

Dr. Trahan opined Claimant could have been exaggerating his condition on September 6, 2000, because Claimant did not want to work or because of Claimant's psychological response to his fear that additional movements upon physical examination would cause pain. Dr. Trahan observed that an MRI was recommended by Mr. Broussard, who referred Claimant to Dr. Bernard for follow-up treatment. Dr. Trahan noted Mr. Broussard's report that Claimant was "uncooperative" was generally consistent with findings by Dr. Bernard. (EX-5, pp. 39, 47-50, 61-63, 91-91a).

On September 7, 2000, Claimant underwent an MRI. Dr. Trahan reviewed the MRI, which was also reviewed by radiologists and Dr. Bernard, and opined the results indicated minor disc bulges at L3-4 and L4-5 without spinal cord compression. There was no focal disc protrusion nor any central canal stenosis.

[9] Dr. Trahan testified he did not personally see Claimant after he treated him on September 1, 2000. (EX-5, p. 40).

The results observed on the MRI were consistent with Claimant's age. Dr. Trahan indicated there was no evidence of inflammation of the sacroiliac joint, which is the area in which Dr. Trahan observed Claimant's complaints of pain. According to Dr. Trahan, the changes observed in Claimant's MRI should be asymptomatic. Based on the MRI results, Dr. Trahan opined Claimant would not require any surgery.[10] (CX-5, p. 2; EX-5, pp. 39-45, 91-91a).

On cross-examination, Dr. Trahan testified he personally treated Claimant on August 25, 2000, and on September 1, 2000, only. He explained that he did not immediately request an MRI because Claimant's physical and neurological examinations were normal. Based on Claimant's reported history of a job injury, Dr. Trahan opined Claimant sustained a job injury. He noted Claimant's job injury could cause Claimant's ligament pain, which also could be caused from pre-existing scoliosis which might be aggravated by simply not stretching before performing daily activities. Dr. Trahan stated his restriction for Claimant to return to a "protected" job was a restriction against returning to heavy manual labor. (EX-5, pp. 64-70).

Dr. Trahan indicated he was not provided with a March 5, 2001 MRI, nor was he given copies of Dr. Blanda's medical records. Dr. Trahan did not know Dr. Blanda was Claimant's treating physician, nor did he know why Dr. Blanda would recommend surgery. He opined surgery would not "do much good" unless there are "obvious findings with neurological deficit." He agreed that some physical manifestations of injury might not arise until some passage of time after initial medical treatment; however, he opined "two years later is kind of a little different." (EX-5, pp. 74-78).

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[10] On September 11, 2000, Claimant returned to Dr. Trahan's office for a follow-up evaluation with Mr. Broussard. He reported "no improvement at all, that he was unable to do anything and that he hurt all the time. Again, [Claimant] seemed to be very uncooperative in the examination." He exhibited "quite inconsistent" results on straight-leg raising tests in the seated and supine positions. After the results of his MRI were communicated to him, he was "obviously not pleased at this point" and was "quite disappointed with his care at this clinic." He was released to return to work at light duty as of August 25, 2000, and was referred by Dr. Trahan's office to Dr. Bernard for an evaluation and a second opinion. (EX-5, pp. 91-91a, 97-98).

Dr. Trahan indicated he found Claimant generally cooperative despite entries by Dr. Bernard and Mr. Broussard that Claimant was uncooperative. He explained, "Some people get hostile because they think nobody believes them." He opined Claimant would have benefited from a referral to a psychologist because, "after a while when doctors kind of rush you along or don't spend time with you, it kind of affects you psychologically." However, Dr. Trahan added he would not know whether Claimant would presently require psychological treatment because he has not seen Claimant in over two years and because he has not reviewed Dr. Blanda's medical records. (EX-5, pp. 79-85).

Douglas A. Bernard, M.D.

On February 11, 2003, the parties deposed Dr. Bernard, who is Board-certified in orthopedic surgery and who has practiced since 1981. On September 20, 2000, Dr. Bernard examined Claimant at Dr. Trahan's referral. Claimant complained of lower back pain related to an offshore injury in which his back became painful and "locked up."[11] (EX-6, pp. 4-8).

According to Dr. Bernard, Claimant was "quite suspicious" and "hostile at times" during his physical examination. Claimant could mount and dismount an examining table without difficulty, yet he could not remove his socks upon request. He was "very jumpy and very hostile." He complained of severe pain with any part of the examination and guarded against any motion at all. Thigh and calf circumferences were symmetrical, indicating no atrophy was present. In a standing position, Claimant's pelvis was level, indicating there were no discrepancies in the length of Claimant's legs. Sensory examination was normal, while deep tendon reflexes were symmetric. Upon motor testing, Claimant exhibited "complete give away weakness of all groups of both lower extremities." Dr. Bernard could discern no muscle spasms nor any objective support for Claimant's subjective complaints. (EX-6, pp. 8-13).

[11] Dr. Bernard did not discuss any history of Claimant's back pain radiating through Claimant's legs or any numbness or tingling in Claimant's feet or toes. Moreover, he observed Claimant ambulating without any limping or other impediments. Dr. Bernard did not report any work restrictions which were assigned by Dr. Trahan. (EX-6, pp. 8-9, 38).

Dr. Bernard reviewed Claimant's lumbar X-rays and MRI results. He noted the quality of the tests was "good." He opined Claimant's lumbar spine X-rays revealed a very mild variety of scoliosis, while Claimant's MRI revealed dehydration and minimal bulges at L3-4 and L4-5 without any indication of herniation or stenosis. He concluded there was no indication from Claimant's MRI that any central nervous system abnormalities resulted from a problematic disc. He opined that findings of degenerative disc disease in Claimant's spine would not be unreasonable for an individual of Claimant's age and history of mild scoliosis. He added that the changes observed on Claimant's films do not occur quickly; rather, they take "years to develop." (EX-6, pp. 13-16).

Dr. Bernard opined Claimant was "grossly overreacting and exaggerating his symptoms, which is basically malingering." He noted that, if the "weakness that [Claimant] pretended to have was to such a degree, if he really was that weak, he wouldn't be able to stand up." He opined Claimant was "basically malingering" and could return to work without further medical recommendations. (EX-6, pp. 16-18).

On cross-examination, Dr. Bernard stated Claimant was referred to him by Dr. Trahan's office. He admitted most of his work is provided for defense attorneys or insurance companies. He admitted he was not Claimant's treating physician. He noted it is possible that an injury may cause a minimal disc bulge, which could also possibly be painful; however, he opined the degenerative changes observed on Claimant's MRI were unrelated to his job injury. Rather, Dr. Bernard concluded Claimant's MRI results were consistent with Claimant's age and his slight scoliosis condition. (EX-6, pp. 18-26).

On July 10, 2003, the parties again deposed Dr. Bernard, who was accepted as an expert in the field of orthopedic surgery. Dr. Bernard again opined Claimant's September 2000 MRI revealed some dehydration at L3-4 and L4-5, where minor disc bulging without any herniation or stenosis was observed. Dr. Bernard reviewed Claimant's September 2000, July 2001 and March 2003 MRIs, which revealed "no significant difference." However, he noted the July 2001 radiologist's impression included a suspicion of a left posterior lateral herniation at L4-5 which was not seen on the other films nor reported elsewhere in Claimant's medical record. (CX-3, pp. 6-7; EX-6, pp. 45-50)

Dr. Bernard noted Claimant's March 5, 2003 MRI revealed inferior foraminal narrowing mostly on the right, but without

complete compromise of the fat plane. Dr. Bernard opined this was "very important" because there was not enough of a disc protrusion to cause any elimination of the fat planes, indicating Claimant's nerves were not being compromised. Considering Claimant's X-rays and "bizarre" behavior upon physical examination, Dr. Bernard concluded Claimant needed no surgery. (CX-4, pp. 20-21; EX-6, pp. 49-50).

On cross-examination, Dr. Bernard explained that Claimant's "bizarre" behavior included "grossly overreacting and exaggerating his symptoms" with "frank give away weakness on motor testing, which is indicative of somebody who's feigning weakness" in the absence of objective findings supporting his subjective complaints. He explained that people with pinched nerves are very specific about their pain, while Claimant's pain was diffuse "everywhere." Claimant was unable to identify a specific painful region. (EX-6, pp. 51-52).

Dr. Bernard opined the degenerative changes observed on Claimant's MRIs did not provide evidence of an injury. According to Dr. Bernard, one would expect to see some changes or differences over three years of MRI testing if an individual sustained an injury. In Claimant's case, the MRIs, which were performed on different machines using different techniques, were "almost identical." He observed no changes among Claimant's MRIs, "other than what you would expect with a mild scoliosis." Dr. Bernard was unaware of literature establishing that people with debilitating pain have negative MRIs; however, he was aware of literature indicating people with positive MRI results are asymptomatic. (EX-6, pp. 52-59).

Louis C. Blanda, Jr., M.D.

On September 26, 2003, Dr. Blanda, a Board-certified orthopedic surgeon, was deposed by the parties. He estimated that he performed surgery on thousands of patients during his approximately 28-year history of practicing medicine. He was accepted by the parties as an expert in orthopedic surgery. (CX-17, pp. 6-8).

Dr. Blanda stated he first treated Claimant, who was referred to him by one of Claimant's friends, on February 6, 2001. Claimant reported a back injury sustained while lifting some grating. His back "went out" and he developed low back pain and a "pins type sensation into his buttocks and occasionally down into the legs on both sides.' He also experienced numbness and tingling down into his feet, more on

the left than the right with a "vague feeling of weakness in the left leg." His pain reportedly increased with physical activity. (CX-1, pp. 43-44; CX-17, pp. 9-10).

According to Dr. Blanda, Claimant reported a 1991 automobile accident involving neck and back pain, but indicated his condition completely resolved and he was released from medical care in March 1992. Following his August 2000 job injury, Claimant treated with Drs. Trahan and Bernard. He underwent an MRI and was prescribed Aleve. He did not return to work following his job injury. He experienced a "flare-up" of his back pain following a January 1, 2001 automobile accident for which he sought medical treatment with "Dr. LaSalle," who prescribed Lortab. (CX-1, pp. 43-44; CX-17, pp. 10-11).

On physical examination, Claimant reported pain on straight-leg raising to ten degrees in the seated position. There were "very minimal attempts to bend and rotate [Claimant's] back due to pain complaints." Muscle testing revealed give-away weakness in both legs. Claimant would not try to perform any heel-toe walking maneuvers. His reflexes were hypo-reflexive, or slow. There was no muscle atrophy. (CX-17, p. 11).

Dr. Blanda "really wasn't sure what was going on with this patient. He was really reluctant to do any type of movement because of his pain problems." Dr. Blanda noted Claimant's September 2000 MRI was prepared approximately two weeks post-injury. He recommended another MRI because disc problems often take weeks or months to "show the entire picture." Dr. Blanda also recommended physical therapy. Dr. Blanda noted Claimant was not working prior to February 6, 2001. He advised Claimant to "continue on that status." (CX-17, pp. 12-13).

On August 14, 2001, Claimant returned for follow-up treatment. He presented with the results of a July 12, 2001 MRI. The MRI results indicated a "definite herniation at L3-4 and what looked like a small herniation at L4-5 on the left." Claimant reported his condition did not improve. He visited an emergency room on several occasions for symptoms of pain. Physical examination revealed a "marked amount of spasm in his back," while he had bilateral pain upon straight-leg raising. Because Claimant did not improve after nearly one year post-injury, Dr. Blanda refilled Claimant's medication and recommended surgery, including a discectomy at L3-4 and L4-5 and a fusion. (CX-1, pp. 6-7, 17-18, 25; CX-17, pp. 13-14).

Claimant returned for follow-up treatment, which was paid for by Employer, on November 8, 2001, December 20, 2001, March 26, 2002, February 18, 2003, March 25, 2003, and May 20, 2003. His condition did not improve on the follow-up visits, while objective findings of muscle spasm were reported. Claimant's reflexes remained decreased while straight-leg raising tests were positive bilaterally. On the follow-up visits, Dr. Blanda continued recommending surgery which was not authorized by Employer. (CX-1, pp. 19-20, 23-24, 65; CX-17, pp. 14-18, 46).

On March 5, 2003, Claimant underwent another MRI, which was recommended by Dr. Blanda. The MRI revealed Claimant's disc abnormality at L3-4 was central and "somewhat on the right [side]" whereas it was earlier reported on the left side upon MRI testing. The L4-5 disc was generally unchanged. (CX-1, pp. 9-10; CX-4, pp. 2-21; CX-17, pp. 17-18).

Dr. Blanda related Claimant's objective findings on examination, namely MRI results, positive straight-leg test results and muscle spasms, to the August 2000 job injury. He noted Claimant sustained a January 1, 2001 automobile accident, but opined Claimant's prior September 7, 2000 MRI revealed spinal abnormalities at L3-4 and L4-5 which were related to the job injury. (CX-17, pp. 18-23).

Dr. Blanda has restricted Claimant to sedentary work with restrictions against any lifting or any type of physical work. Without surgery, he opined Claimant will be permanently impaired with sedentary restrictions. If surgery is authorized and is successful, Dr. Blanda opined Claimant could return to medium-duty labor at which he could lift up to 50 pounds. (CX-17, pp. 23-26).

On cross-examination, Dr. Blanda admitted he did not review any medical reports from Drs. Bernard, Heard or Murphy. He was then provided with Dr. Bernard's September 21, 2000 report indicating Claimant was uncooperative and that there were no objective findings upon physical examination supporting Claimant's subjective pain complaints, which were gross overreactions and exaggerations. Dr. Blanda stated he also found Claimant uncooperative upon his initial February 2001 treatment. Nevertheless, he opined Claimant's subjective complaints were reliable because Claimant "developed more consistent objectivity and his [MRI] got worse." (CX-17, pp. 27-29, 34-35, 42-43; EX-5, pp. 99).

Dr. Blanda admitted he "didn't find anything objective" during his February 2001 initial treatment of Claimant. Moreover, from an orthopedic standpoint, there was no evidence of atrophy nor any other objective findings upon physical examination which would preclude Claimant's return to work in February 2001. (CX-17, pp. 29-31).

Dr. Blanda was next provided with a copy of Dr. Heard's April 18, 2001 medical report indicating Claimant was grossly exaggerating symptoms which were not supported by any objective findings upon physical examination. He noted his February 2001 visit with Claimant revealed inconsistencies which could be the result of Claimant's fear of movement or the consequence of malingering. He again explained that Claimant's subjective complaints were reliable because Claimant's July 2001 MRI results indicated Claimant's spinal condition worsened and his August 2001 follow-up visit, which happened after the occurrence of "a big gap in the times that I saw him," revealed objective evidence of a muscle spasm. (CX-17, pp. 34-37; EX-3).

Dr. Blanda opined Claimant's spinal abnormalities could possibly be the result of Claimant's car accident, which might have possibly aggravated Claimant's condition; however, he opined that Claimant's job injury started the degenerative processes observed on MRI testing. He admitted he never reviewed the September 2000 MRI film, but relied only upon the MRI report. (CX-17, pp. 37-42).

Dr. Blanda was presented with Dr. Murphy's December 6, 2001 report indicating Claimant's "reactions to the examination were so contrived and non-physiological as to be ridiculous" and that there were no objective findings supporting the subjective complaints of Claimant, who was "either an out-and-out malingerer or has severe mental problems." He opined that, "if everybody's got some conflict with [Claimant's] psychological makeup, then, obviously [Claimant] ought to have a psychological evaluation done." He added that Claimant might have some psychological overlay, "but that doesn't discount the fact that he's got objective problems." He would not recommend treatment with a neurosurgeon, but would not disagree with a recommendation for neurological treatment. (CX-17, pp. 43-45, 59-60; EX-1, p. 7).

Dr. Blanda opined Claimant did not suffer from "frank spinal central stenosis," but some stenosis was present "along the nerve tunnels, the foramen where the nerves are being pinched by the protruding disc." According to Dr. Blanda,

Claimant's most recent MRI revealed some perineural compromise at L3-4, "but not a lot." He opined that fat planes which are fairly intact generally indicate nerves are not being compromised. (CX-17, pp. 46-50).

Assuming Claimant's surgery would be approved, Dr. Blanda would not recommend immediate surgery; rather, he opined Claimant should first undergo a psychological evaluation for his psychological condition which might be worsened by surgery. He indicated he did not receive Claimant's discharge summary from the physical therapy provider. He opined Claimant had not reached maximum medical improvement. (CX-17, pp. 46-48).

On re-direct examination, Dr. Blanda stated Claimant's September 2000 MRI results, which indicated a probable disc abnormality, provided some objective support for Claimant's description of sustaining a job injury. However, he noted Claimant "certainly" had some psychological overlay. He affirmed his earlier testimony that, from an orthopedic standpoint, there were no objective findings upon physical examination. He explained that he recommended Claimant, who was already not working, should remain off work to "make sure whether or not [Claimant] had a problem or not before dismissing him." Dr. Blanda opined Claimant might find his current financial condition and claim proceedings stressful; however, conceded such an opinion should be rendered by a psychological expert. (CX-17, pp. 56-63).

Claude Tremblay, P.T.

On September 26, 2003, the parties deposed Mr. Tremblay, who was accepted by the parties as an expert in physical therapy. Mr. Tremblay, who was referred by Dr. Blanda, treated Claimant from February 13, 2001, through April 4, 2001. (EX-12, p. 17-19; EX-17, pp. 4-5).

On February 13, 2001, Claimant reported bilateral pain radiating into his lower extremities. He described the intensity of the pain as an "eight" out of a possible ten. He also complained of bilateral toe numbness. Mr. Tremblay did not evaluate Claimant's range of motion because Claimant complained of severe pain; however, he observed Claimant mobilizing "through half of normal range of motion" while ambulating about the clinic, sitting in a chair and providing his medical history. Mr. Tremblay did not find it inconsistent that Claimant's range of motion could not be formally evaluated

despite Claimant's capability of ambulating through half of normal range of motion. (EX-17, pp. 5-7).

Likewise, Mr. Tremblay did not evaluate Claimant's strength because of subjective complaints of pain; however, Mr. Tremblay observed Claimant mobilizing against gravity without assistance. Mr. Tremblay opined Claimant demonstrated strength of at least "three" out of a possible five. According to Mr. Tremblay, "three" represents an ability to mobilize against gravity, while "four" indicates the capability of mobilizing against resistance, and "five" means mobilizing against full resistance. (EX-12, p. 19; EX-17, pp. 7-8).

Mr. Tremblay's short-term goals for Claimant included: (1) instruction and implementation of a home-exercise program; (2) use of pain management modalities, namely analgesics and anti-inflammatory agents; (3) achieving increased range of motion; (4) establishing increased strength; (5) improving range of motion; and (6) attaining a 15-percent improvement in Claimant's overall condition. Mr. Tremblay's long-term goals included: (1) achieving a reduction in Claimant's subjective complaints of pain to an approximate three to four out of ten; (2) reaching a range of motion within functional requirements; (3) improving strength; (4) increasing endurance to approximately 45 minutes of exercise; (5) achieving independence from his home exercise program; and (6) attaining a 50-percent overall improvement in overall condition. (EX-12, p. 19; EX-17, pp. 8-10).

Mr. Tremblay anticipated treating Claimant three times weekly for one month. Claimant failed to attend all of his physical therapy sessions. Nevertheless, on April 4, 2001, Claimant reported subjectively being approximately "75 percent," where "0 percent" implies no recovery, and "100 percent" indicates a complete improvement. Claimant also reported that his pain remained constant, but was approximately a seven out of a possible ten. The pain occurred daily with certain activities and during the night. Claimant reported the physical therapy helped his condition. (EX-12, pp. 10-42; EX-17, pp. 10-14).

Mr. Tremblay testified he never received any of Claimant's MRI results nor discussed the results with Claimant. He was unaware whether Claimant continued treating with Dr. Blanda while undergoing physical therapy. He never received a history of a car accident or prior back injuries from Claimant. (EX-17, pp. 14-16).

Mr. Tremblay opined Claimant reached all of his short-term goals and all but one of his long-term goals. The only long-term goal Claimant did not reach was a reduction in Claimant's subjective complaints of pain to approximately a "four" out of a possible ten. (EX-12, pp. 17-18; EX-17, pp. 14-16).

After he prepared Claimant's May 10, 2001 discharge summary, Mr. Tremblay expected Claimant to undergo a re-evaluation with Dr. Blanda. He unsuccessfully attempted to follow-up with Claimant and Liberty to determine Claimant's status after a re-evaluation with Dr. Blanda. He assumed Claimant returned to Dr. Blanda, who recommended no further physical therapy. Consequently, he discharged Claimant from physical therapy. (EX-12, pp. 17-18; EX-17, pp. 16-17).

On cross-examination, Mr. Tremblay stated he found nothing which would disprove Claimant's complaints of pain. He opined Dr. Blanda's findings of disc herniations and a recommendation for surgery could be consistent with Claimant's complaints of constant pain; however, he noted herniated discs do not necessarily cause pain. He added that herniated discs may sometimes successfully be treated by physical therapy in the absence of surgery, but he could not predict the likelihood that Claimant would recover through non-surgical treatment alone. He did not know whether more physical therapy would help Claimant. (EX-17, pp. 19-28).

Michael E. Heard, M.D.

On September 29, 2003, the parties deposed Dr. Heard, who is Board-certified in orthopedic surgery and who has practiced continuously since 1981. He was accepted as an expert in the field of orthopedic surgery. He examined Claimant on April 18, 2001, at Employer's request. (EX-3; EX-16, pp. 5-6).

Claimant presented with complaints of low back pain following an August 24, 2000 job injury which he sustained while lifting grating and a pipe. He reported a history of constant, sharp and burning pain radiating into the right and left pararlumbar areas and into his feet. According to Claimant, the pain was becoming worse. (EX-16, p. 6).

Claimant reported that he underwent an MRI while treating with Drs. Trahan and Bernard. The MRI failed to show any disc herniation or neurocompression; however, some small bulges were noted at L3-4 and L4-5. Claimant also reported that he began treating with Dr. Blanda in February 2001. According to

Claimant, Dr. Blanda prescribed Lortab. Claimant indicated he had no back problems prior to his August 2000 job injury, but he received surgical treatment for an unrelated knee injury in 1991. He did not report any history of an automobile accident in which he related a "flare-up" of back pain. (EX-16, pp. 7-10).

Upon physical examination, Dr. Heard found Claimant was in no acute distress. Claimant reported he was unable to walk on his toes or heels because of increased pain. Likewise, Claimant reported he was unable to bend over from the standing position "not even one inch." However, Claimant was observed bending forward to "12 inches less full-toe touches" in the sitting position. According to Dr. Heard, Claimant's inability to bend while standing was inconsistent with his ability to bend "pretty far" while sitting. Claimant also reported his inability to bend "right, left or backwards at all;" however, reflex and sensory testing revealed no gross motor leg weakness or nerve compression. (EX-16, pp. 10-13).

Likewise, Claimant's straight-leg testing was "extremely positive at very minimal elevation" when he laid flat on his back; however, straight leg testing was "completely negative in the sitting position when the same maneuver basically is done lifting the leg up 80 degrees." Dr. Heard opined Claimant's straight-leg test results demonstrated "inconsistency to an extreme amount here." Similarly, Claimant was "extremely sensitive to touch in the midline and lumbar area" of his back; however, Dr. Heard found no discernable muscle spasm in Claimant's low back area on the right and left sides. Claimant complained of "fairly diffuse" pain, but identified "no well localized pain or tenderness." (EX-16, pp. 13-14).

Dr. Heard pulled Claimant's knees into his chest without reports of pain. Claimant was able to bend into the "figure four sign" without aggravating the sacroiliac joint. Claimant was able to "flip over from the prone to the supine position without difficulty." Dr. Heard found no atrophy, which he would expect "if there's any evidence of neurocompression." Without atrophy, which may or may not occur with back pain, Dr. Heard opined there "wasn't [sic] any neurological deficits or pinched nerves causing wasting of the muscles down his leg." On further objective testing, Dr. Heard found no evidence of any neurological deficits. (EX-16, pp. 14-16).

Dr. Heard ordered X-rays, which were unremarkable. He reviewed Claimant's September 7, 2000 MRI, which indicated no

evidence of any neurocompression or herniated discs. He opined Claimant's subjective complaints must be "markedly discounted because they were not reliable" due to "severe exaggeration of complaints." He recommended no surgical treatment nor any further testing or medical treatment. He concluded over-the-counter medications should be used for any ongoing complaints of pain. He opined there was no orthopedic reason to restrict Claimant from returning to work.[12] (EX-17, pp. 16-17).

On September 25, 2003, Dr. Heard reviewed Claimant's July 2001 and March 2003 MRIs. He noted all of Claimant's MRIs were performed at different times and places using different machines, which implied the results were "not all going to be exactly identical." However, he did not find "anything significant in the films that would justify a surgical operation." The July 2001 MRI revealed "a more significant bulging" of the disc; however, the March 2003 revealed "an improved [disc]." Dr. Heard explained that discs are "dynamic," which may result in improved findings on MRI testing due to physical loads on discs which may differ from day to day. Consequently, he concluded the variances revealed in Claimant's MRIs were "not anything significant in this particular patient that would indicate to me that any surgical intervention was necessary." (EX-17, pp. 17-19).

On cross-examination, Dr. Heard stated Claimant's first MRI in September 2000 revealed minor disc bulging at L3-4 and L4-5, while the July 2001 MRI indicated a suspected herniation at L4-5 and a herniation at L3-4. However, the later MRI did not reveal any nerve impingement. Dr. Heard opined minor bulging observed on the first MRI could sometimes cause chronic back pain. He noted Claimant's MRIs could be consistent with complaints of pain. He explained that swelling related to contained protrusions or disc bulges may vary daily, which cause "good days or bad days or medium days;" however, if a herniated disc is no longer contained, "you're going to have all bad days." He opined Claimant "probably did have some element of pain at the time [sic] of all these MRIs [and] at the time he saw me," but he concluded Claimant was not experiencing as much pain as he described. (EX-17, pp. 19-22, 30-31).

[12] Dr. Heard also reported on April 18, 2001 that there was "no orthopedic reason to restrict [Claimant] from his work activities" and recommended Claimant "go back to work." (EX-3, p. 2).

Dr. Heard opined Claimant's July 2001 MRI "definitely" revealed "a more progressed protrusion or greater amount of bulge or defect than the prior MRI," which revealed minimal bulging at L3-4 and L4-5. He explained that Claimant's July 2001 MRI results might warrant a recommendation for an operation if those results correlated with the patient's subjective complaints of pain. He noted that he was only asked to evaluate Claimant; however, had he treated Claimant, he would have found Claimant's complaints of pain were not credible and would have recommended against surgery in favor of conservative treatment. He also would have restricted Claimant from returning to "heavy and very heavy" activities. (EX-17, pp. 22-27).

Dr. Heard would not be surprised if Dr. Blanda diagnosed a disc herniation and prescribed physical therapy after reviewing the July 2001 MRI results. Likewise, Dr. Heard would not disagree with a medication prescription; however, he would not prescribe a narcotic medication because Claimant appeared to exaggerate his symptoms. Rather, he would prescribe over-the-counter medications. (EX-17, pp. 27-31).

On re-direct examination, Dr. Heard opined there is "no way to really know" within medical probability if the abnormalities observed on Claimant's July 2001 MRI were the results of an automobile accident or an occupational injury. He opined the improvement noticed on Claimant's March 2003 MRI was consistent with dynamic and ongoing changes implying Claimant's condition is "worse some days than other days." He noted Claimant reported undergoing physical therapy, but opined the therapy "obviously didn't give him any lasting relief because . . . he was complaining of constant severe pain down the upper/lower leg and foot on both the right and left side." (EX-17, pp. 31-34).

George A. Murphy, M.D.

On April 16, 2002, the parties deposed Dr. Murphy, who is Board-certified in orthopedic surgery and who has practiced since 1980. The parties accepted Dr. Murphy as an expert in the field of orthopedic surgery. (EX-7, pp. 4-6).

On November 6, 2001, Dr. Murphy evaluated Claimant at the request of DOL. Claimant was 48 years old and presented with complaints of low back pain related to an August 2000 job injury which Claimant reported sustaining while lifting equipment. Claimant reported his legs would "give out." His leg symptoms were "exactly the same" in both legs. He also reported numbness in his toes. Claimant received therapy and was prescribed

Lortab, which he was taking four times daily. He was wearing a corset and his physician recommended surgery. Dr. Murphy opined Claimant's complaints that his legs "were exactly the same" is atypical for a back problem. (EX-1, p. 7; EX-7, pp. 6-8).

Dr. Murphy noted that DOL directed Claimant to bring X-rays and MRIs to the evaluation, but Claimant failed to produce the materials. Claimant reported that the results revealed he had two bad discs. Dr. Murphy opined Claimant's examination was "remarkable in how absurd it was." Claimant's responses to "just about every aspect" of the examination were "so contrived and nonphysiological as to be utterly ridiculous." Claimant acted "as if he could barely move," and "he had to have someone help him remove clothing and [his] corset." He "completely overreacted to even the slightest touch anywhere." There was no evidence of any spasm or deformity. When Claimant was asked to move things, he "refused to move at all. He would not move his feet or legs for any type of muscle testing." (EX-7, p. 8).

According to Dr. Murphy, Claimant walked in to the examination, "and if he couldn't move anything, he wouldn't have been able to walk in." He noted Claimant could move without complaint upon distraction. For instance, when Claimant was seated, his straight-leg raising test results were "completely negative." However, when he attempted to do a straight-leg raising in the supine position, which included raising the legs just slightly off the bed, Claimant "just went crazy with pain and contortion as if someone had told him that, if someone raises your legs, you'd better react, and he did." Claimant displayed the "same reaction" to very light touching about his pelvis, which "shouldn't cause any changes with regard to the low back." Dr. Murphy opined "this was an absolute absurd presentation." Even if Claimant's testing would show changes, Dr. Murphy opined "there's no way you could recommend surgery in someone like this, because there's no way to know what is going on." He concluded Claimant was either "an out-and-out malingerer or had a severe mental problem." (EX-7, pp. 8-9).

Dr. Murphy again noted he was not provided Claimant's radiographical evidence; however, if the tests "were not very dramatic, then more than likely, [Claimant] is just a malingerer." He stated, "in all my practice, I've only come across maybe . . . just two or three instances where I put something in writing in a report like this." He noted he takes referrals from plaintiffs and defendants, but reiterated this examination was the result of a DOL referral. He indicated his opinion was not biased by either side in this matter, noting he

received no reports by any other examining or treating physicians. (EX-7, pp. 9-11).

On cross-examination, Dr. Murphy did not recall Claimant's attitude. He only recalled that Claimant's reactions to his requests upon examination were "so ridiculous as to, you know, say that it didn't even come close to representing a true picture of what might be going on." Dr. Murphy acknowledged physical injuries and the litigation process may trigger psychological problems. If somebody has an underlying emotional problem, Dr. Murphy opined the "adversarial process" will exacerbate the problem. Dr. Murphy agreed individuals might become frustrated if they were receiving no benefits during recovery, but opined such a factual occurrence should not cause a "dishonest attempt during the evaluation and examination. And there were some aspects of the examination that were definitely, what I would consider, not an honest effort." He specifically noted Claimant's inconsistent straight-leg raising test results which indicated Claimant was untruthful. (EX-7, pp. 11-16).

Dr. Murphy could not recommend surgery, "even if the testing showed some disc disease," because Claimant was "either an out-and-out malingerer or he had a severe mental problem." Dr. Murphy opined surgery is a poor recommendation for Claimant in consideration of Claimant's responses on physical examination. Dr. Murphy noted his opinion "might" change if Claimant's mental condition was evaluated by a psychiatrist or psychologist. (EX-7, pp. 16-18).

The Vocational Evidence

Employer's payroll records identify eight weekly payments which were made to Claimant: (1) $237.50 for the week ending July 9, 2000, when Claimant worked 25 hours; (2) $629.38 for the week ending July 16, 2000, when Claimant worked 57.50 hours; (3) $743.38 for the week ending July 23, 2000, when Claimant worked 65.50 hours; (4) $1,206.50 for the week ending July 30, 2000, when Claimant worked 98.00 hours; (5) $1,235.00 for the week ending August 6, 2000, when Claimant worked 100.00 hours; (6) $351.50 for the week ending August 13, 2000, when Claimant worked 37.00 hours; (7) $750.50 for the week ending August 20, 2000, when Claimant worked 66.00 hours; and (8) $589.00 for the week ending August 27, 2000, when Claimant worked 52 hours. The number of days which Claimant worked are not identified in Employer's payroll history. (EX-8).

Other Evidence

Case Management Summary

Employer submitted Claimant's case management study which was prepared by Rick Keen. The summary indicates Claimant was injured on August 24, 2000 and returned to shore via a regularly scheduled helicopter flight. Claimant was scheduled to treat with Dr. Trahan. On August 25, 2000, Claimant was evaluated by Dr. Trahan, who released him to return to work at "regular duty." On August 28, 2000, Claimant returned to the safety office, where he complained of back problems, but indicated he desired to return to work. (EX-14, p. 2).

On September 6, 2000, Claimant treated at the Occupational Medical Clinic, which released him to return to work with restrictions against lifting more than 20 pounds, bending and twisting. He was offered light duty activities in Employer's tool room, but refused to work because "he was not dressed and did not want to work that day." On September 7, 2000, Claimant underwent an MRI and did not return to work. On September 8, 2000, Dr. Trahan informed Employer's safety manager that there were "no problems on the MRI which would account for the supposed level of discomfort which [Claimant] is experiencing." Claimant requested pain medication from the clinic. He left a voice message with the safety officer indicating "he is in too much pain to work."

On September 11, 2000, Claimant requested treatment with Dr. Blanda. It was noted Claimant was released to work at light duty with restrictions against lifting more than 20 pounds.

State of Louisiana Uniform Vehicle Traffic Crash Report and Louisiana Uniform DWI Arrest Report

On January 1, 2001, Claimant attempted to pass a van while he was driving a 1985 Toyota Camry. The van turned left toward a private driveway as Claimant was overtaking the van on its left side. Claimant's car struck the van and careened through a fence, into a street sign, which "was pushed through the hood" of Claimant's vehicle, and into a parked car. Claimant's car sustained "very severe" damage to its front end, while the van incurred "minor/moderate" damage and the parked car received "severe" damage to its left side. (EX-10, pp. 5-12)

Claimant reported a forehead injury and difficulty standing due to pain in both legs. He also indicated he took Lortab and

drank a 32-ounce beer prior to the crash. Blood tests revealed Claimant's blood-alcohol content was ".06." Claimant received a citation for first-offense DWI and for reckless operation. He was arrested for DWI, but was "released on a DWI citation because of injuries sustained in the crash." (EX-10, pp. 3, 5-12).

Iberia Medical Center Medical Records

Following his January 1, 2001 automobile accident, Claimant received emergency medical care at Iberia Medical Center, where he reported with complaints of headache and severe pain in his left knee. He was diagnosed with a head contusion and a tibial plateau fracture in his left knee. Claimant was prescribed crutches and a knee immobilizer for his left knee, while his Lortab prescription was refilled for complaints of pain. He was referred to the "UMC Orthopedic Clinic" for follow-up treatment. (EX-9, pp. 3-6, 9, 12).

Dauterive Hospital

On June 14, 2001, Claimant visited the Dauterive Hospital (Dauterive) with moderate, burning low back pain which radiated into both legs and which was exacerbated by any movement. His pain was similar to prior back pains related to an August 2000 offshore injury. He was prescribed Lortab and referred to his private physician if his symptoms did not improve within three days. On September 6, 2001, Claimant returned with complaints of moderate low back pain which was "ongoing" for 1 year. He was diagnosed with low back pain and prescribed Tylenol or Advil as needed for pain. (CX-2, pp. 5-9, 11-16).

On September 12, 2001, Claimant returned to Dauterive with shoulder complaints after he received a "glancing blow by [a] car." He was diagnosed with a sprained left shoulder and prescribed a sling and Lortab. On November 18, 2001, Claimant returned with back pain. He was diagnosed with back pain, prescribed Flexeril and referred to his treating physician. On November 23, 2001, Claimant returned with complaints of back pain; however, he left the emergency room prior to a physician's evaluation, stating, "never mind." (CX-2, pp. 18-36).[13]

[13] Claimant also visited Dauterive on June 19, 1990 for right knee complaints which are not related to the instant matter. He was diagnosed with a probable ligament tear, prescribed Advil, restricted from work and referred to another clinic for follow-up treatment. (CX-2, pp. 39-41).

Employer's Authorization for Medical Treatment

On January 24, 2001, Employer authorized continuing treatment for Claimant's ongoing back condition; however, it denied liability for Claimant's knee condition following his automobile accident. Employer directed Claimant to respond with his choice of physician for further back treatment. Employer also advised Claimant that Dr. Bernard released him to return to work at light duty and that Employer "made arrangements to accommodate a light duty assignment." Employer requested a release to return to work following Claimant's recovery from his non-occupational knee injury. (EX-15).

Employer's Medical Payment History

Employer's July 15, 2003 report of medical payments indicates Employer paid $5,686.96 for 78 entries related to Dr. Blanda's visits, medications, physical therapy, radiology and MRI testing and emergency room visits from October 12, 2000 through June 21, 2003. The dates of payments, payment amounts and payees are identified; however, the dates on which the various services were performed are not described in the payment history. There are no apparent interruptions in medical payments or refusals to authorize medical payments identified on the payment history from October 12, 2000 through June 21, 2003. (EX-13).

The Contentions of the Parties

Claimant seeks payment of compensation benefits for his disability status after his job injury. He argues he is temporarily totally disabled because he has not reached maximum medical improvement and because Dr. Blanda, his treating physician, recommended surgery. He contends he worked for Employer for eight weeks prior to his job injury, but the first and last weeks should not be counted in computing the average weekly wage because they constituted "half weeks." Consequently, he avers his average weekly wage may reasonably be determined by dividing his total pre-injury earnings with Employer by six, which is the number of "full" weeks he worked prior to his job injury.

Claimant argues Employer is liable for penalties because it knowingly and willfully made false statements. Specifically, Claimant alleges Mr. Mattox's voice mail indicating Claimant's medical benefits would be suspended if Claimant persisted in

failing to comply with scheduled medical evaluations was unlawful because Mr. Mollere testified Claimant's medical benefits were never interrupted.

Employer contends Claimant's average weekly wage is $717.85, which is reasonably derived by dividing all of Claimant's pre-injury wages from Employer by eight, the total number of weeks Claimant worked for Employer. Employer argues Claimant earned no income during a three-year period before his employment with Employer because Claimant was incarcerated.

Employer argues Dr. Trahan released Claimant to return to a modified duty position. Employer contends Claimant refused a modified position within his physical restrictions and limitations at Employer's facility at the same rate of pay. Employer avers Dr. Blanda's opinion that Claimant experienced ongoing symptoms related to his job injury is not persuasive because multiple other doctors, including independent medical examiner Dr. Murphy, found inconclusive results on objective testing and opined Claimant was exaggerating complaints. Moreover, Employer argues Dr. Blanda's opinion is entitled to little probative value because he treated Claimant months after other physicians treated Claimant for his job injury and after a "gap" in treatment occurred during which Claimant sustained a substantial automobile accident, which precipitated subsequent medical treatment. Employer disputes Dr. Blanda's recommendation for surgery because it contends all of the physicians who examined Claimant agreed no surgery was necessary.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the

credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Credibility

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972); Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999).

Claimant's burden of persuasion rests principally upon his testimony and reports made to treating and consulting physicians and providers. I found Claimant was generally not impressive as a witness in terms of confidence, forthrightness, accuracy and overall bearing on the witness stand, which detracts from his demeanor and believability. His testimony is characterized by its mutual and internal inconsistencies and contradictions.

Claimant's testimony that Dr. Trahan recommended physical therapy and restricted him from returning to any work in August 2000 is without factual support and contradicted by his admission that Dr. Trahan advised him to return to light duty work, which would improve his condition. His testimony is also belied by his concession that the medical records indicate he did not undergo physical therapy until he treated with Dr. Blanda in February 2001.

Moreover, the persuasiveness of Claimant's testimony that Dr. Trahan placed Claimant off work is eroded by the contrary testimony of Dr. Trahan and Mr. Mollere indicating that employment accommodations were arranged which would allow Claimant to capably return to work at his prior salary within his physical limitations and restrictions related to his post-injury condition. His inability to produce a disability slip

indicating Dr. Trahan restricted him from returning to any work further detracts from the reliability of his testimony.

Claimant's testimony that Dr. Trahan ordered no X-rays is contradicted by Dr. Trahan's records and testimony indicating he ordered Claimant's radiographs on August 25, 2000, when the X-ray results revealed mild scoliosis. Claimant's testimony that his pain disturbs his sleep is corroborated by his wife's testimony; however, the symptom is not medically documented. The record does not indicate Claimant reported any meaningful history of sleep disorders due to pain, nor does it establish whether any physician prescribed any medications or otherwise treated Claimant for pain-related sleep disorders.

Claimant's testimony that Dr. Bernard provided massage and heat therapy treatments which temporarily provided relief is refuted by Dr. Bernard's medical report and testimony which indicate Dr. Bernard found no evidence of any muscle spasms nor any objective support for Claimant's subjective complaints which Dr. Bernard found "quite suspicious." Claimant's testimony is further contradicted by Dr. Bernard's testimony that Claimant was "grossly overreacting and exaggerating his symptoms" and could return to work without further medical recommendations.

Claimant's testimony that Employer continued arranging appointments with Dr. Bernard after he requested treatment with Dr. Blanda finds some support in Mr. Keen's case management summary indicating Claimant requested Dr. Blanda on September 11, 2000, which pre-dated Claimant's September 20, 2000 referral to Dr. Bernard by Dr. Trahan's office. However, his testimony is diminished by his admission that he did not make any appointments with Dr. Blanda while he treated with Drs. Trahan and Bernard.

Claimant's testimony that he made no appointments with Dr. Blanda while treating with Drs. Trahan and Bernard is consistent with Dr. Blanda's medical records indicating Claimant did not have any appointments until October 26, 2000, when he was a "no-show," and that he did not treat with Dr. Blanda until February 6, 2001, well after Dr. Bernard's September 20, 2000 examination. It is noted Claimant's testimony that he requested authorization for Dr. Blanda's treatment from Drs. Bernard and Trahan is not sufficiently supported by the medical records.

Moreover, Claimant's testimony, which tends to imply Employer did not authorize Dr. Blanda's treatment, is undermined by his admission Employer authorized Dr. Blanda. His admission

is further supported by Employer's Authorization for Medical Treatment approving the physician of Claimant's choice and by Employer's medical payment history indicating all of Dr. Blanda's treatments related to Claimant's back injury were paid. Claimant's admission is also supported by Mr. Mollere's testimony indicating Employer paid for Dr. Blanda's medical treatments upon request, except for recommended surgery.

Likewise, Claimant's testimony that Employer refused to pay for his medications is contrary to Employer's medical payment history indicating Employer paid for Claimant's medications. His testimony is also contradicted by Mr. Mollere's testimony that Employer paid for any medications upon request.

I find Claimant's failure to present MRIs at Dr. Murphy's independent medical examination adversely impacts his credibility, especially in consideration of his candid admission that he was directed by DOL to present such medical evidence to Dr. Murphy. Claimant offered no explanation for not complying with the DOL request.

Lastly, I agree with Employer's assertions that Claimant's subjective complaints of pain find no objective support in the record. Rather, all of the physicians who treated or evaluated Claimant found evidence of inconsistencies and symptom exaggeration which was ultimately described by Dr. Murphy as "an absolute absurd presentation." Dr. Bernard's opinion that Claimant would not be able to walk or mount an examining table on September 20, 2000, if Claimant's complaints were believable, is generally consistent with Dr. Murphy's opinion that Claimant would not have been able to walk into his office on November 6, 2001, if Claimant's complaints were believable. Claimant's treating physician even agreed Claimant demonstrated exaggerations and inconsistencies upon physical examination, which otherwise revealed no objective findings.

Although Dr. Blanda opined Claimant's MRI results reveal a worsening of Claimant's condition which is responsible for Claimant's symptoms, his opinion is undermined by the remaining medical opinions of record establishing Claimant's spinal abnormalities would not render Claimant symptomatic, as discussed more thoroughly below. Consequently, I find Claimant's subjective complaints of pain are not factually supported by objective findings upon physical examination and are undermined by multiple objective medical findings of inconsistencies.

In light of the foregoing, I find Claimant's subjective complaints are entitled to little probative value. I find the medical records should more accurately dictate the basis for disposition of this matter.

B. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant contends he was injured offshore while lifting a heavy metal grate and subsequently reaching for hoses. Employer, through Mr. Mollere, does not appear to challenge the injury; however, the parties indicated in their joint exhibit that Claimant's injury is debatable.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the

Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, Claimant's uncontroverted testimony establishes he sustained an injury as described. Claimant indicated the injury was witnessed by co-workers, and Employer produced no contrary evidence or witnesses disputing the injury as alleged. Claimant submitted the deposition testimony of Dr. Blanda, who indicated an injury as described by Claimant could cause complaints such as those reported by Claimant. Likewise, Dr. Trahan opined the injury which Claimant described could cause ligamentous pain which Claimant reported, while Dr. Heard indicated Claimant's MRI results might be consistent with complaints of pain.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on August 24, 2000, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994);. "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer produced the deposition testimony of Dr. Trahan, who opined Claimant's spinal abnormalities, which are consistent with his age and history of mild scoliosis, should be asymptomatic. Likewise, Employer submitted the deposition testimony of Dr. Bernard, who found no objective support for Claimant's subjective complaints and who also concluded Claimant's MRI results revealed no evidence of any central nervous abnormalities caused by a problematic disc. Employer's submission of Dr. Heard's testimony also indicates Claimant exhibited no objective findings upon physical examination while his MRI results included abnormalities which did not impinge any nerves. Lastly, the record includes Dr. Murphy's medical opinion that Claimant demonstrated no objective findings upon physical examination and that Claimant is possibly malingering.

In light of the contrary medical opinions of record, I find Employer presented sufficient evidence to rebut the presumption of compensability under Section 20(a) of the Act. Accordingly, the record must be weighed as a whole.

3. Weighing the Entire Record as a Whole

a. Claimant's Physical Complaints

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physician rule in

which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980) ("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

Claimant argues the unanimous opinions of Drs. Trahan, Bernard, Heard and Murphy that Claimant's subjective complaints of pain are without objective medical support should be overlooked because Dr. Blanda is Claimant's treating physician. I find Claimant's sole reliance upon a treating physician rule is misplaced.

Initially, it is noted Dr. Blanda did not review the findings of the other physicians of record, nor did he review the discharge summary from the physical therapy provider to which he referred Claimant. Dr. Blanda treated Claimant approximately eight times over three years. By his own estimate some visits were separated by "big gaps" of time, namely periods of roughly six months or nearly one year. I find Dr. Blanda's sporadic treatments do not warrant special deference to his medical opinions.

Further, the medical record contains substantial evidence contradicting Dr. Blanda's opinion that Claimant sustained a disabling injury which precludes him from returning to work beyond a sedentary capacity and which requires spinal surgery at multiple levels. As noted above, the record is replete with medical findings that Claimant exaggerated his symptoms, which were inconsistent and without objective support. Dr. Blanda even agreed with the entirety of the other physicians that Claimant exaggerated his symptoms which were without objective findings and inconsistent.

I find Dr. Blanda's explanation that Claimant's complaints reliably indicated his condition because Claimant eventually exhibited a muscle spasm is not sufficiently persuasive to establish an ongoing, job-related condition. Dr. Blanda failed to adequately explain why such a finding was not established until August 2001, after a "big gap" in time between treatments. Although Dr. Blanda testified muscle spasms might not occur

daily, he failed to explain why every other physician who examined Claimant, before Dr. Blanda treated him, or who concurrently examined Claimant while Dr. Blanda treated him observed no such findings.

Likewise, I find Dr. Blanda's opinion that Claimant sustained a disabling injury because of abnormalities observed on MRI testing is unpersuasive in consideration of the well-reasoned and consistent opinions of Drs. Trahan, Bernard and Heard. Dr. Blanda stands alone in concluding Claimant's MRI results reveal symptomatic abnormalities. However, Dr. Blanda failed to sufficiently explain why Claimant's spinal condition would be symptomatic. Dr. Blanda's opinion is undermined by his testimony that fat planes which are fairly intact generally indicate nerves are not being compromised. The MRI results reveal fairly intact fat planes, as noted by Dr. Bernard, who opined Claimant's spinal abnormalities were not causing nerve compression. Accordingly, I find Dr. Blanda's opinion that Claimant's MRIs reveal symptomatic abnormalities is unpersuasive.

Otherwise, Dr. Blanda offered no persuasive well-reasoned explanation why Claimant suffers ongoing symptoms related to his job injury. Dr. Blanda did not refute the opinions of Drs. Trahan and Bernard that Claimant's spinal abnormalities are consistent for an individual of Claimant's age with a history of scoliosis, nor did he adequately explain why the sacroiliac condition observed by Dr. Trahan did not resolve within a few weeks. Consequently, I find Dr. Blanda's unsupported opinions are generally unpersuasive, which warrant no special deference as the opinions of a treating physician.

On the other hand, I find Dr. Trahan's opinion that Claimant sustained a lumbosacral strain with sacroiliac inflammation of the ligaments on August 24, 2000, when Claimant was lifting a heavy metal grate and working with hoses, is well-reasoned and generally supported by the other medical opinions of record. Dr. Trahan treated Claimant on August 25, 2000, and September 1, 2000, when Claimant could identify the localized area of pain, namely the sacroiliac area containing ligaments. However, Claimant's complaints evolved to include complaints of non-localized areas of tenderness with inconsistent findings upon physical examination when Mr. Broussard treated him on September 6, 2000, the day before Claimant's first MRI revealed no evidence of any inflammation along the sacroiliac joint.

Thereafter, according to Dr. Trahan, Claimant's MRI results did not provide any evidence of inflammation in the sacroiliac joint; however, there was some evidence of bulging discs at L3-4 and L4-5. His opinions are generally supported by those of Drs. Bernard, Blanda, and Heard. For the reasons noted more thoroughly above, I find Dr. Blanda's unique opinion that Claimant's MRI results reveal an ongoing disabling injury is unpersuasive in light of the remaining medical opinions of record.

Moreover, I am favorably impressed with Dr. Trahan's opinion that Claimant's condition should have resolved within four weeks of injury following conservative treatment. His opinion is supported by Dr. Bernard's September 20, 2000 opinion upon physical examination and radiographic review that Claimant could return to work without further medical recommendations. Dr. Bernard's opinion is generally consistent with Dr. Blanda's February 6, 2001 opinion that he "really wasn't sure what was going on" with Claimant, who revealed no objective findings upon physical examination which would preclude his return to work.

Although Dr. Murphy elaborated on Claimant's inconsistencies upon physical examination, he did not refute the occurrence of Claimant's August 24, 2000 occupational injury. Likewise, Mr. Tremblay, who found nothing during physical therapy which would undermine Claimant's complaints of pain, did not dispute the occurrence of an injury.

Meanwhile, Mr. Mollere indicated Employer was not controverting Claimant's injury, which he acknowledged was a mild injury with symptoms. Rather, according to Mr. Mollere, Employer disputed the extent of Claimant's injury and the reasonableness of recommended surgery.

In light of the foregoing, I find the preponderance of the probative record evidence establishes Claimant sustained an occupational injury, namely a lumbosacral strain with sacroiliac inflammation of the ligaments on August 24, 2000, while lifting metal grating and reaching for hoses in the course of employment, which could have caused Claimant's harm or pain.

b. Claimant's Psychological Complaints

Claimant implicitly argues that he suffers from a psychological overlay related to his job injury because his psychological condition was briefly discussed during the depositions of Drs. Trahan, an occupational medicine provider,

and Drs. Blanda and Murphy, who are orthopedic specialists. Assuming **arguendo** Claimant argues he experiences a psychological condition related to his job injury, I find his argument without merit.

None of the physicians related Claimant's alleged psychological overlay to his job injury. Dr. Trahan specifically opined he would not know whether Claimant would need psychological evaluation because he has not treated Claimant nor reviewed pertinent medical records supporting a referral for a psychological evaluation.

Further, Dr. Trahan's opinion that some people become hostile because they think nobody believes them overlooks the facts in this matter, which indicate Employer immediately returned Claimant to shore for medical treatment with Dr. Trahan, Mr. Broussard and Dr. Bernard. Claimant's medical treatment further resulted in X-ray and MRI testing, a prescription for Aleve, hot bath treatments, exercises and a release to return to work with restrictions, which Employer was apparently willing to accommodate, but which Claimant refused to attempt. His argument also overlooks Employer's authorization for Claimant to treat with his choice of physician as well as Employer's payment of ongoing medical benefits, including Dr. Blanda's treatment and physical therapy, despite no objective findings of symptoms upon physical examination.

Dr. Blanda's opinion that a psychological evaluation might be advisable due to the difference of medical opinions in this matter fails to relate a psychological condition to Claimant's job injury. Likewise, his opinion that Claimant certainly displayed psychological overlay fails to establish such a condition was caused by his job injury. The record does not otherwise establish Claimant treated with a psychological expert who could relate any psychological condition to his job injury.

Claimant also appears to contend that the denial of compensation benefits, which allegedly resulted in multiple evictions and interruptions of utilities, combined with the adversarial process related to pursuing his claim to cause his psychological condition. His contention is somewhat supported by Dr. Murphy's acknowledgement that litigation and the adversarial process might be stressful for some injured individuals; however, his argument overlooks inconsistent symptoms and uncooperative behavior he demonstrated within days of his job injury, well before any adversarial process began. Although Dr. Murphy opined litigation and the adversarial

process might be stressful for certain individuals with an underlying emotional problem, the record does not establish Claimant suffered from any underlying emotional problem.

In light of the foregoing, I find Claimant failed to establish he suffers from a compensable psychological injury related to his August 24, 2000 occupational injury.

C. Nature and Extent of Disability

Having found that Claimant suffers from a compensable traumatic injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

D. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

On August 24, 2000, I find Claimant could no longer perform his heavy-duty job, pursuant to his uncontroverted testimony, which is generally supported by Dr. Trahan's opinion that Claimant should have been restricted to light-duty, onshore work

with restrictions against lifting more than 20 pounds and no repetitive twisting, bending or stooping post-injury. Accordingly, I find Claimant has established a **prima facie** case of total disability on August 24, 2000 since he could not return to his former job.

Thereafter, Dr. Trahan's opinion that Claimant's condition should resolve within approximately four weeks is supported by Dr. Bernard's September 20, 2000 opinion that Claimant could return to work without further medical recommendations. Dr. Trahan's opinion is generally consistent with Dr. Blanda's opinion that Claimant revealed no physical findings upon physical examination which would preclude his return to work in February 2001. Likewise, Dr. Trahan's opinion is supported by Dr. Heard's opinion that there was no orthopedic reason to restrict Claimant from returning to work in April 2001. Dr. Trahan's opinion that Claimant's condition should resolve within four weeks is also generally supported by Dr. Murphy's opinion that Claimant's responses to just about every aspect of his November 6, 2001 examination were "so contrived and non-physiological as to be utterly ridiculous."

Although Dr. Blanda opined Claimant had not yet reached maximum medical improvement, I find his opinion is undermined by his testimony that Claimant exaggerated his symptoms, which were inconsistent and without objective medical support upon physical examination. Likewise, his opinion is belied by his admission that he was not really sure what plagued Claimant when he treated Claimant in February 2001. His lone explanation that Claimant suffered from back complaints related to abnormalities observed on MRIs and because muscle spasms were reported in August 2002 is not persuasive in consideration of the contrary medical opinions, findings and explanations, as noted above. Likewise, I find Dr. Blanda's sole opinion that Claimant should undergo surgery is neither well-reasoned nor persuasive, as discussed more thoroughly below.

Further, I find Dr. Heard's hypothetical explanation that he might have restricted Claimant from "heavy and very heavy activities" if he would have been Claimant's treating physician is not persuasive in establishing Claimant was restricted from returning to his prior occupation. Dr. Heard candidly admitted he was only asked to evaluate Claimant on one occasion. He did not have the benefit of treating Claimant shortly after the August 2000 job injury, nor did he discuss Claimant's scoliosis which was reported by Drs. Blanda, Bernard and Trahan. Moreover, he could not opine whether Claimant's abnormalities

observed on his July 2001 MRI were the results of Claimant's occupational injury or Claimant's January 2001 car accident, which further minimizes a conclusion that Dr. Heard would have restricted Claimant from returning to "heavy and very heavy activities" as a result of his job injury. Consequently, I find Dr. Heard's hypothetical restrictions are not convincing in establishing Claimant was precluded from returning to his prior occupation after Dr. Bernard released Claimant to return to work without further medical recommendations.

In light of the foregoing, I find Claimant reached maximum medical improvement from his August 24, 2000 job injury, namely a lumbosacral strain with sacroiliac inflammation of the ligaments, on September 20, 2000, when Dr. Bernard released Claimant to return to work without further medical recommendations. Dr. Bernard's opinion is well-reasoned and supported by the opinion of Dr. Trahan, who referred Claimant to him for follow-up treatment. Dr. Bernard's opinion is further supported by the normal findings upon physical examination by Drs. Blanda, Heard and Murphy and by the opinions of Drs. Blanda and Heard that there was no orthopedic reason precluding Claimant from returning to work when they treated or evaluated him. Moreover, it is noted that Claimant's complaints, related to the localized area around the sacroiliac region, reached a plateau by September 20, 2000, when he no longer identified that area as symptomatic. Rather, his complaints were diffuse, exaggerated and inconsistent, which were findings that persisted through the entirety of his subsequent treatment.

Accordingly, I find Claimant reached maximum medical improvement from his job injury and was not orthopedically precluded from returning to his prior occupation on September 20, 2000. All periods of disability prior to September 20, 2000 are considered temporary under the Act.

I find Claimant's unsupported and grossly exaggerated complaints, which were noted by Dr. Blanda and described as "basically malingering" by Dr. Bernard, "severely exaggerated" by Dr. Heard, and "utterly ridiculous" by Dr. Murphy, fail to establish Claimant was unable to return to work after September 20, 2000. However, as discussed more thoroughly below, the record does not establish Employer notified Claimant of any job offers after Dr. Bernard's September 20, 2000 opinion until January 24, 2001. Consequently, I find Claimant failed to establish entitlement to ongoing compensation benefits after January 24, 2001. See Greenwich Collieries, supra.

E. Intervening Cause

Employer argues Claimant's January 2001 automobile accident constitutes an intervening cause which terminates its liability for his work-related condition. Claimant argues the accident primarily affected his knees and neck, while it merely temporarily exacerbated his work-related symptoms.

If there has been a **subsequent non-work-related injury or aggravation**, the employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (CRT) (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); Cyr v. Crescent Wharf & Warehouse Co., supra; Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988); Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979); Marsala v. Triple A South, 14 BRBS 39, 42 (1981); See also Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987).

Where there is no evidence of record which apportions the disability between the two injuries it is appropriate to hold employer liable for benefits for the entire disability. Plappert v. Marine Corps. Exchange, 31 BRBS 13, 15 (1997), aff'd 31 BRBS 109 (en banc); Bass v. Broadway Maintenance, 28 BRBS 11, 15-16 (1994); Merrill, 25 BRBS at 144-145; Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981).

Moreover, if there has been a subsequent non-work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non-work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

The Fifth Circuit has set forth "somewhat different standards" regarding establishment of supervening events. Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997). The initial standard was set forth in Voris v. Texas Employers Ins. Ass'n, which held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. 190 F.2d 929, 934 (5th Cir. 1951). Later, the court in Mississippi Coast Marine v. Bosarge, held that a simple "worsening" could give rise to a supervening cause. 637 F.2d 994, 1000 (5th Cir. 1981). Specifically, the court held that "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." Id.

In the present matter, Claimant's automobile accident was the result of negligence, which caused the accident. There is no allegation nor any evidence that Claimant's work-related injury caused the accident. Accordingly, I find Claimant's automobile accident after his work-related injury was not the natural or unavoidable results of Claimant's work-related injury. Thus, the injury may constitute an intervening cause of a subsequent injury occurring outside of work to relieve Employer's liability for the subsequent injuries.

Although Claimant testified that he sustained a "flare-up" of back pain following his car wreck, I find there is insufficient evidence of record indicating Claimant's condition, a sacroiliac injury, became worse as a result of his car wreck, which affected his knees and forehead, according to the accident report. I find the emergency room record establishes Claimant sustained a head contusion and a fractured left knee. For those complaints, Claimant apparently treated with a physician who is not of record, while he treated for back complaints with Dr. Blanda. His exaggerated back complaints were consistent with exaggerated back complaints prior to the occurrence of the car wreck. Accordingly, the record does not support a conclusion Claimant's car wreck worsened or overpowered and nullified his job injury.

Moreover, the medical evidence of record does not establish to what extent the possible intervening cause overpowered or nullified Claimant's original condition after he reached maximum medical improvement from the job injury. An apportionment of Claimant's disability may not be determined based on Dr. Blanda's opinion that Claimant's spinal abnormalities might be

caused by the car wreck or by his job injury. Likewise, an apportionment may not be reached based on Dr. Heard's opinion that there is "no way to really know" if Claimant's abnormalities were the results of a car wreck or an occupational injury. Accordingly, I find the medical evidence of record does not support an apportionment of Claimant's disability among his occupational injury and his car accident.

Likewise, there is insufficient vocational evidence of record which could assist in a resolution of the matter. As discussed above, Claimant established a **prima facie** case of total disability after his job injury through September 20, 2000. Evidence of suitable alternate employment for any period after September 20, 2000 is not of record. Thus, there is insufficient vocational evidence supporting an apportionment of any diminution of wage-earning capacity among Claimant's job injury and car accident. Consequently, it is unclear to what extent Claimant's disability status could have been worsened by his car accident.

In light of the foregoing, I find no reasonable basis on which to apportion disability among Claimant's injuries. Thus, Employer is liable for the entire disability. See Plappert, supra.

F. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and

that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Employer submitted the testimony of Dr. Trahan and Mr. Mollere who agree Employer, through Mr. Keen, was willing to attempt to provide Claimant with a job within his physical restrictions and limitations. Mr. Keen's testimony is notably not of record; however, his case management summary is. The case management summary indicates Claimant was released to "regular duty" on August 25, 2000. There is no indication Mr. Keen's entry of "regular duty" implied any light-duty restrictions, which is arguably consistent with Claimant's testimony that Employer directed him to return to offshore work. Likewise, it is consistent with Dr. Trahan's testimony that he modified Claimant's work release to preclude offshore employment after Employer requested Claimant's return to that occupation.

Meanwhile, Mr. Keen's report indicates Claimant was released to return to work on September 6, 2000, when he was restricted from lifting more than 20 pounds, bending and twisting, which is inconsistent with Dr. Trahan's release to return to work with the additional restriction against "stooping." Claimant was offered "light-duty activities in the tool room;" however, there is no description of the activities Claimant was offered. Notably, Claimant reportedly refused the September 6, 2000 light-duty offer because he was not dressed for work. Meanwhile, Mr. Keen's report includes a September 11, 2000 entry indicating Claimant was released with "restrictions <20# light duty," but fails to discuss bending, twisting or stooping restrictions. The September 11, 2000 entry does not describe a light-duty job offer on that date.

Although Dr. Trahan and Mr. Mollere agree Employer was willing to accommodate Claimant, neither witness adequately described the physical requirements of Claimant's anticipated job at Employer's facility. Accordingly, there is insufficient evidence of the precise nature and terms of the alleged light-duty job opportunities Employer contends constitute suitable alternative employment for the undersigned to rationally determine if Claimant was physically and mentally capable of performing the work and that it was realistically available.

On September 20, 2000, Dr. Bernard released Claimant to return to work without any further recommendations; however, the record does not establish Claimant was notified of Dr. Bernard's

release to return to work until January 24, 2001, when Employer provided Claimant with its authorization to treat with Dr. Blanda. It is noted that Employer's medical authorization characterizes Dr. Bernard's release as a release to return to work with light-duty restrictions. However, I find Employer's medical authorization inaccurately describes Dr. Bernard's opinion and release in consideration of Dr. Bernard's deposition testimony and medical report establishing Dr. Bernard's opinion that Claimant, who grossly exaggerated his symptoms and was "basically malingering" symptoms which were without any objective support, was able to return to work without any medical recommendations. I find Employer's January 24, 2001 characterization of Dr. Bernard's release in its medical authorization arguably confuses Dr. Trahan's September 11, 2000 restrictions, which pre-dated Dr. Trahan's discharge of Claimant, in favor of Dr. Bernard.

Consequently, I find the record establishes Claimant could return to his prior occupation on September 20, 2000, pursuant to Dr. Bernard's opinion. A conclusion that Claimant could return to his prior job is generally supported by Dr. Trahan, who opined the sacroiliac injury Claimant sustained should heal within four weeks; Claimant's MRIs, which establish no sacroiliac inflammation nor any symptomatic spinal abnormalities according to the preponderance of medical opinions of record; Drs. Blanda and Heard, who opined there was no orthopedic reason Claimant could not return to work based on findings upon physical examination; and by Dr. Murphy, who agreed with all of the physicians of record that Claimant exaggerated symptoms, which he opined were "utterly ridiculous."

Although the light-duty position discussed in Employer's January 24, 2001 medical authorization provides no job description detailing the particular physical job requirements, I find the position was a position which Claimant was able perform in light of Dr. Bernard's release to return to work without further medical recommendations. Consequently, I find Employer failed to establish suitable alternative employment until January 24, 2001, when Claimant was offered a position by Employer and could physically return to work at his former duties.

G. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section

10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

In the instant case, Claimant worked as a sandblaster/painter for only eight weeks for the Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979)(33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990) (34.5 weeks is substantially all of the year; the nature

of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

I conclude that because Sections 10(a) and 10(b) of the Act can not be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter. Claimant argues his average weekly wage is $957.13, which represents his total earnings with Employer divided by six, the number of "full weeks" he worked for Employer. Claimant argues two weeks he worked were "half weeks," which should be ignored. On the other hand, Employer avers Claimant's average weekly wage is $717.85, which represents Claimant's total earnings divided

by eight, the number of calendar weeks Claimant worked for Employer prior to his job injury.

I agree with the parties that Claimant's pre-injury earnings with Employer are more accurate in determining his average weekly wage than his earnings during other periods, including approximately three years in which Claimant was incarcerated. The record indicates Claimant earned a total of $5,742.76 during the eight calendar weeks Claimant worked for Employer; however, the record does not contain daily wage records establishing Claimant's daily wage rate. I disagree with Claimant that partial weeks should be ignored in the calculus of his average weekly wage. Likewise, I disagree with Employer that the entirety of calendar weeks should be considered in determining Claimant's average weekly wage when he did not perform actual work on the days Employer seeks to include.

Claimant indicated his employment consisted of six full weeks and two "half-weeks," which I find reasonably represents the period of time in which Claimant worked for Employer pre-injury. Consequently, I find and conclude Claimant's average weekly wage may be reasonably represented as $820.39, which represents his total earnings divided by seven ($5,742.76 ÷ (6 weeks + (2 x 1/2 week)) = $820.39).

H. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a) (2003).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

1. The Reasonableness of Recommended Surgery

As noted above, I find Dr. Blanda's opinions are not as well-reasoned as the remaining physicians of record. Additionally, he candidly admitted that he did not review

Claimant's discharge summary from Mr. Tremblay, who indicated Claimant demonstrated a 75-percent improvement without surgery and who indicated patients with spinal injuries may fully recover through physical therapy without surgical treatment. I find Dr. Blanda's opinion that Claimant requires surgery is belied by his opinion elsewhere that, assuming surgery would be authorized by Employer, Claimant would require psychological counseling prior to surgery to "make sure whether or not [Claimant] had a problem or not."

On the other hand, I find the unanimous and well-reasoned opinions of Drs. Trahan, Bernard, Heard and Murphy persuasive in establishing Claimant does not require surgery for any job-related injury. Consequently, I find Claimant failed to establish Dr. Blanda's recommended surgical treatment is reasonable and necessary for his job injury.

2. Reimbursement for Medications and Medical Treatment

Claimant testified Employer did not reimburse him for any medications he purchased following his job injury. However, the record includes evidence of multiple payments by Employer for medications. Likewise, the record generally establishes that Employer paid for all medical services related to Claimant's job injury except for Dr. Blanda's recommended surgical procedures, which Employer disputed. Mr. Mollere indicated Employer generally paid for all requested medications and medical services, which is supported by Employer's history of medical payments. Other than Dr. Blanda's surgical requests, the record contains insufficient evidence establishing Claimant requested payment for any other medications and medical expenses which were reasonable, necessary for and appropriate to his injury. To the extent that Claimant has made such requests which remain outstanding, Employer shall be liable to reimburse Claimant for any expenses he has incurred.

3. Reimbursement for Travel

Costs incurred for transportation for medical purposes are recoverable under Section 7(a) of the Act. Day v. Ship Shape Maintenance Co., 16 BRBS 38 (1983). Meanwhile, 20 C.F.R. § 702.403 provides, "Generally, 25 miles from . . . the employee's home is a reasonable distance to travel.

Claimant contends Employer never paid for his transportation expenses related to traveling approximately 20 miles from his home to Dr. Blanda's office. The record includes

no statements indicating Employer reimbursed Claimant for his transportation costs which were for medical purposes and which were reasonable. Employer shall be liable for Claimant's medical transportation costs to the extent Employer has not already reimbursed Claimant for such costs.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer, which was notified of Claimant's injury on August 24, 2000, paid no compensation benefits following the injury. However, it filed a Notice of Controversion on September 26, 2000, after receiving Dr. Bernard's report indicating Claimant was likely malingering.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[14] Thus, Employer was liable for Claimant's permanent total disability compensation payment on September 7, 2000. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by September 21, 2000, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did not file a timely notice of controversion until September 26, 2000, and is liable for Section 14(e) penalties for any unpaid disability compensation Claimant is owed from August 24, 2000 until September 26, 2000.

VI. SECTION 31(C) PENALTY

Section 31(c) of the Act provides:

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[14] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

> A person including, but not limited to, an employer, his duly authorized agent, or an employee of an insurance carrier who knowingly and willfully makes a false statement or representation **for the purpose of reducing, denying, or terminating benefits to an injured employee**, or his dependents pursuant to Section 9 [33 U.S.C. § 909] if the injury results in death, shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

33 U.S.C. § 931(c) (2003) (emphasis added). On the other hand, Section 907(d)(4) of the Act provides:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. § 907(d)(4) (2003).

Claimant contends he is entitled to the "maximum penalties assessable" against Employer because Mr. Mattox threatened to suspend Claimant's medical benefits if Claimant continued to miss scheduled medical evaluations. I find Claimant's argument is specious and without merit.

The record establishes no suspensions in medical benefits ever occurred because Claimant presented for follow-up treatment very shortly after his medical benefits were allegedly threatened. Claimant appears to contend his uninterrupted medical benefits prove Mr. Mattox knowingly and willfully made a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee; however, I disagree. I find the representation was made for the purpose of persuading Claimant to attend a scheduled medical evaluation with Dr. Heard. A conclusion that Mr. Mattox's representation relates to the anticipated medical evaluation is

buttressed by the testimony of Mr. Mollere, who indicated Claimant's medical benefits were never interrupted because Claimant quickly complied with the medical evaluation. Accordingly, Claimant's request for penalties under Section 31 of the Act is **DENIED.**

VII. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VIII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[15] A

[15] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has

service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

IX. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability from August 24, 2000, to January 24, 2001, based on Claimant's average weekly wage of $820.39, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's August 24, 2000, work injury, including any transportation costs, pursuant to the provisions of Section 7 of the Act.

3. Employer is not liable for the surgical procedures recommended by Dr. Blanda.

4. Employer shall be liable for an assessment under Section 14(e) of the Act for any unpaid installments found to be due and owing prior to September 26, 2000, as provided herein.

5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and

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determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **June 6, 2002**, the date this matter was referred from the District Director.

opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 27th day of February, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge